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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1161.~~ 67

JOHN W. TERRY and
RICHARD D. CHILTON,
Petitioners,

v.

STATE OF OHIO,
Respondent.

BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF OHIO In Support of Petition for Writ of Certiorari.

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BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF OHIO In Support of Petition for Writ of Certiorari.

INTEREST OF AMICUS.

The American Civil Liberties Union of Ohio is the Ohio affiliate of the American Civil Liberties Union, a national organization of persons dedicated to the preservation of a free and open society, principally through the protections embodied in our Bill of Rights and the Fourteenth Amendment to the United States Constitution.

The formulation of standards of criminal due process consistent with the imperatives of individual liberty in an ordered society has long been a vital function of this Court. The entire spectrum of the rights of the accused has demanded, and quite properly received, its ever-increasing attention. Nowhere, however, is the relationship between the accused and prosecutorial government more critical than at the very inception of the criminal process—at the

point of arrest and accompanying search—an area traditionally safeguarded by the protections of the Fourth Amendment.

This case involves the application of important Fourth Amendment considerations to on-the-street detention and interrogation, (an area of law known in street vernacular as "stop and frisk,") which has been thrust upon the constitutional stage by this Court's decisions in *Mapp v. Ohio*, 367 U. S. 643 (1961) which held that the yield of illegal searches and seizures is inadmissible in evidence against the accused in state criminal proceedings, and *Beck v. Ohio*, 379 U. S. 89 (1964), which held that state arrests in the absence of probable cause do not justify warrantless accompanying searches. These cases demonstrate this Court's great and continuing concern for the inviolability of the right of privacy of the accused, except upon a clear showing by law enforcement authorities of probable cause to invade it.

But for the serious assault upon precious Fourth Amendment principle which, in the name of police necessity, has been mounted by those who seek to circumvent the federal standards of exclusion of tainted evidence required by *Mapp* and *Beck*, no special attention to "stop and frisk" police activity would be indicated. But, unless this Court acts, recent "stop and frisk" case law,[1] legisla-

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[1] *California*: People v. Garrett, 238 Cal. App. 2d 292, 47 Cal. Rptr. 731 (3d Dist. Ct. App. 1965); *Massachusetts*: Commonwealth v. Ballou, 217 N. E. 2d 187 (1966); *New York*: People v. Sibron, 18 N. Y. 2d 603, 219 N. E. 2d 196, 35 U. S. L. Week 3321 (U. S. March 14, 1967) (No. 821 Misc.; renumbered 1039, March 21, 1967); People v. Peters, 18 N. Y. 2d 238, 219 N. E. 2d 595 (1966); People v. Pugach, 15 N. Y. 2d 65, 204 N. E. 2d 176, cert. denied 380 U. S. 936 (1965); People v. Rivera, 14 N. Y. 2d 441, 201 N. E. 2d 32, cert. denied 379 U. S. 978 (1964); *Pennsylvania*: Commonwealth v. Hicks, 223 A. 2d 873 (Pa. Super. Ct. 1966). But see United States v. Margeson, 259 F. Supp. 256 (E. D. Pa. 1966).

tion[2] and public debate[3] will have effectively emasculated the shield of probable cause which the Fourth Amendment has interposed between the legitimate investigative function of the police and the right of the individual citizen, as against his government, to be let alone.

On-the-street detention and interrogation is a particularly sensitive area. It is the point at which the police officer has his greatest contact with the community in whose service he is employed. The failure, in the name of police efficiency, to compel constitutional conduct in this sphere is, in the long view, inefficient as well as un-

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[2] N. Y. Code Crim. Proc. § 180-a. A "Stop and Search" bill was introduced in the Ohio legislature early in the 1967 session and defeated after a vigorous floor debate. See Cleveland Plain Dealer, Feb. 23, 1967, p. 4 col. 3. A similar fate was met by a recently proposed Illinois statute. See, *Frisking in the Absence of Sufficient Grounds for Arrest as a Common Police Practice Today*, 1965 U. ILL. L. F. 119, 127, see also, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02 (Tent. Draft No. 1, 1966); A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (U. S. Govt. Printing Agency, Feb. 1967).

[3] Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L. C. & P. S. 251 (1966); Schoenfeld, *The "Stop and Frisk" Law is Unconstitutional*, 17 SYRACUSE L. REV. 627 (1966); Comments, *Police Power to Stop, Frisk and Question Suspicious Persons*, 65 COLUM. L. REV. 848 (1965); Redlich, *Constitutional Law*, 16 SYRACUSE L. REV. 211 (1965); Notes, 50 CORNELL L. Q. 529 (1965); *Frisking in the Absence of Sufficient Grounds for Arrest as a Common Police Practice Today*, 1965 U. ILL. L. F. 119; Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211 (1964); Decisions, 10 N. Y. L. F. 410 (1964); Comments, 39 N. Y. U. L. REV. 1092 (1964); *New York "Frisk" and "Knock-Not" Statutes: Are They Constitutional?* 30 BROOKLYN L. REV. 274 (1964); Recent Decisions, 31 BROOKLYN L. REV. 174 (1964); Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., C. & P. S. 373 (1963); see also, U. S. News & World Report, February 27, 1967, p. 74; *Cleveland Plain Dealer*, February 12, 1967, p. 10-AA col. 1; Bruno, *Chicago's Scholarly Cop*, Reporter, March 24, 1966; *New York Times*, March 9, 1964, p. 24, col. 1; and *Civil Liberties and Police Power*, The Commonweal, April 3, 1964, p. 29.

constitutional—it serves only to discredit the entire system of law enforcement in the eyes of the community which it serves and upon which it must ultimately depend to combat crime.

In urging strong adherence to constitutional protections against police misconduct in the "stop and frisk" area, *amicus* intends no criticism of police officers generally, nor of the police officer whose conduct it here seeks to restrain. That he was only trying to do his job and that policemen generally are trying to do theirs is not denied. Unfortunately, the refusal of other governmental agencies to clearly delineate constitutional police conduct has left this Court with the obligation to tell the police what their job is, and what means they may constitutionally use to do it.

The record in the present case provides a clear opportunity for this Court to confront the constitutional implications of the "stop and frisk" problem under circumstances uncomplicated either by factual discrepancy in the record or by legislative enactment on the subject.

It is in the hope that in some measure *amicus* may be of assistance to the Court in performing its delicate task of weighing "the social need that crime shall be repressed" [4] against "the social need that the law will not be flouted by the insolence of office" [5] that this brief is filed.

Because we consider it to be highly important to the advancement of these objectives that this Court consider the case at bar on its merits, *amicus* has elected to participate at this preliminary stage of these proceedings by filing this brief in support of the petition for certiorari.

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[4] Cardozo, J. in *People v. Defore*, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926).

[5] *Ibid.*

The written consent of the parties to this appearance *amicus* has been obtained and filed with the Clerk of the Court.

QUESTIONS PRESENTED.

I.

Was the warrantless detention and interrogation of petitioners in broad daylight on a busy street by a police officer who, solely on the basis of his observation of the ambiguous conduct of the petitioners, suspected that they were about to rob a store, an illegal arrest in violation of the Fourth and Fourteenth Amendments to the United States Constitution?

II.

In the absence of a contemporaneous valid arrest, was the warrantless "frisk" of the person of petitioner Terry for weapons an illegal search requiring suppression of its yield under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

III.

Where a police officer had neither probable cause to arrest, nor probable cause to search petitioners, but detained petitioners on a busy street in broad daylight for the purpose of interrogating them in connection with their involvement in a crime which he suspected they were about to commit, was the "frisk" of the person of petitioner Terry solely to protect the police officer's life independently justifiable on that ground, so that weapons seized as a result of such "frisk" could be admitted in evidence against the accused without violating the exclusionary rule of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE.

On October 31, 1963, at about 2:30 p.m., in broad daylight, petitioners were seen on a busy street in the business district in downtown Cleveland, Ohio.[6] A plain-clothes police officer,[7] assigned to stores and pickpockets in the downtown area,[8] observed their behavior for a period of about ten minutes,[9] from a vantage point across the street approximately 300 to 400 feet away.[10] He noted that petitioners, both Negroes, were walking back and forth on the sidewalk in front of a row of stores, peering in the windows of one of several stores,[11] and returning to the corner, when they engaged in conversation with each other, and ultimately with a third man, a white man, who joined them later.[12] Although he had no previous information about them,[13] and did not know them,[14] and admitted that there was nothing unusual about their dress or appearance,[15] or their gait,[16] he "suspected they were waiting for an opportunity to pull a stick-up,"[17] despite the fact that he had never arrested anyone before for a prospective "stick-up,"[18] nor had he ever in his entire

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[6] R. 12, 116.

[7] R. 122.

[8] R. 106.

[9] R. 13.

[10] R. 12.

[11] R. 23, 119.

[12] R. 13, 22.

[13] R. 119.

[14] R. 119.

[15] R. 120.

[16] R. 15, 121.

[17] R. 138.

[18] R. 160.

thirty-five years of experience as a detective observed anyone "casing a place" for prospective misconduct.[19]

He subsequently testified that he "didn't like them,"[20] or "their actions,"[21] that he "was just attracted to them and * * * surmised that there was something going on,"[22] and that he did not know whether, if he saw them engaged in the identical conduct again he would have had any cause for suspicion.[23]

In any event, when the police officer saw the three men conversing, he ran across the street,[24] and, in the ordinary pedestrian traffic of a busy street in a commercial district during business hours,[25] accosted petitioners and the other man.[26] He said he was a police officer but did not show his badge,[27] or identify himself further.[28] He asked the men their names,[29] and they responded with alacrity.[30] Whereupon the police officer grasped petitioner Terry, turned him around and patted the outside of his topcoat, felt the outlines of a weapon, reached into the upper left hand inside pocket of his topcoat, felt the handle of a gun, and, when he could not pull the gun out of the pocket easily, pulled the topcoat off petitioner and seized the weapon.[31] The police officer then ordered the

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[19] R. 46.
[20] R. 118.
[21] R. 42.
[22] R. 118.
[23] R. 47.
[24] R. 121.
[25] R. 124.
[26] R. 16.
[27] R. 122.
[28] R. 123.
[29] R. 16, 123.
[30] R. 16.
[31] R. 16, 124.

three men into a nearby store,[32] shouted to the storekeeper to "call the wagon," [33] at which point the police officer concedes all three men were under arrest, Terry for carrying a concealed weapon,[34] the other two for "association with him."[35] While they had their hands raised above their heads, the police officer proceeded to search petitioner Chilton and the other man,[36] and discovered and seized a gun in the outer left hand pocket of Chilton's coat.[37] Search of the other man revealed no weapons.[38] All three men were transported to the police station.[39] Petitioners were charged initially with "investigation" and then with carrying concealed weapons in violation of Section 2923.01 Ohio Revised Code.[40]

In response to separate indictments returned against each of the petitioners,[41] both moved to suppress the seized weapons in advance of trial.[42] Because the legal questions raised in both motions to suppress were interrelated, they were consolidated by the court,[42a] and an oral hearing, during which the police officer appeared as the sole witness,[43] was held. The trial judge, after expressly rejecting the contention of the prosecution that the seizure of the weapons was pursuant to a lawful ar-

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[32] R. 13, 125.
[33] R. 125.
[34] R. 33.
[35] R. 131.
[36] R. 17.
[37] R. 17, 19.
[38] R. 17.
[39] R. 134.
[40] R. 129.
[41] R. 4.
[42] R. 4.
[42a] R. 5.
[43] R. 11-48.

rest,[44] overruled the defense motions to suppress the weapons as evidence, on the ground that "the guns [were] the fruit of the frisk, and not of a search."[45]

At the subsequent trials of each of the petitioners, the defense unsuccessfully renewed its motion to suppress the weapons as evidence,[46] the weapons were admitted into evidence and each of the petitioners was convicted as charged.[47] *State v. Chilton*, 95 Ohio L. Abs. 321 (Cuyahoga Common Pleas, 1964). The Court of Appeals of the Eighth Judicial District of Ohio affirmed the convictions. *State v. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). The Ohio Supreme Court denied defense motions to certify the questions on October 19, 1966. It is these adverse decisions from which petitioners seek relief in this Court.

REASONS FOR GRANTING THE WRIT.

It cannot be doubted that for many years, state police officers have been stopping and frisking[48] suspects, without their consent, without a search warrant or probable cause, and using the yield of such searches to convict them of crimes. The constitutionality of such police

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[44] R. 100.

[45] R. 98.

[46] R. 103, 222.

[47] R. 233.

[48] The use by *amicus* of the term "stop and frisk" throughout this brief is occasioned by its brevity rather than its street sophistication. Wherever generally used, and as used here, the phrase has come to mean on-the-street detention for purposes of police interrogation, accompanied by a search of the person of the suspect, ostensibly for the purpose of protecting the safety of the police officer. In the absence of probable cause to search, the subsequent use of incriminating evidence so obtained to convict the suspect of a crime, demonstrates that under some circumstances, a policeman's suspicion, like virtue, is its own reward.

practice has been in doubt at least since *Wolf v. Colorado,* 338 U. S. 25 (1949), which applied the core of the Fourth Amendment to the states through the Due Process Clause of the Fourteenth. The evidence so seized has been constitutionally inadmissible in state criminal cases since *Mapp v. Ohio,* 367 U. S. 643 (1961) as a result of the elevation of the federal exclusionary rule of *Weeks v. United States,* 232 U. S. 383 (1914), to a constitutional command. And when *Beck v. Ohio,* 379 U. S. 89 (1964) made it clear that federal standards of arrest, including the constitutional condition precedent of probable cause, set the minimal requirements of valid *state* arrest as well, the constitutional threat to continued state police "stop and frisk" activity was evident.

The response of the proponents of "stop and frisk" police conduct was immediate and imaginative. Unable to seriously claim either that probable cause is not an essential precondition of constitutional arrest, or that probable cause can be demonstrated in the circumstances of the classic on-the-street detention, they urged that the detention of a citizen for a short period for interrogation and investigation purposes was not an arrest at all, despite the restraint upon the liberty of the suspect. By such semantic wizardry the "stop" was transformed into a sub-arrest or non-arrest, to which none of the constitutional requirements of arrest applied. And probable cause as a standard against which to measure the lawfulness of the detention was thereby effectively bypassed.

But the architects of "stop and frisk" justification were faced with a more serious Fourth Amendment problem: the "frisk" which followed the "stop" was on even more shaky constitutional ground. For whether the stop was considered to be an *unlawful* arrest or *no arrest at all,* it is apparent that by no stretch of the imagination could there have been a lawful arrest which might have

justified an incidental search, absent a search warrant or probable cause to search. And since this Court has never sanctioned any non-consensual search as "reasonable" which was neither incidental to a lawful arrest, nor supported by a valid search warrant or probable cause, and appears to be disinclined to do so, the apologists for "stop and frisk" police conduct resolved the "frisk" problem in the same fashion as they had disposed of the "stop" question. Since the "stop" was not an arrest, it was not difficult for them to conclude that the accompanying "frisk" was not a search, and that Fourth Amendment considerations were therefore as inapplicable to the "frisk" as to the "stop." The police officer's running his hands over the body of the suspect in the public street in a search for weapons was excused as but a minor invasion of privacy necessary to protect the officer's safety during the period of interrogation; in the event that the "frisk" yielded incriminating evidence, no exclusionary rule could suppress it, for the public policy which permits police officers to frisk for weapons to protect their own safety also requires that the yield of the frisk be allowed into evidence to convict the accused long after the danger to the police, real or imagined, has been dissipated.

Thus did the lower courts in the instant case reason in order to sustain the conviction of petitioners. Refusing to accept the contention of the prosecution that the detention of petitioners constituted a lawful arrest,[49] they substituted the "reasonableness" of the police officer's

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[49] Although the prosecution urged that there was indeed an arrest—a lawful arrest based upon probable cause—prior to the search for weapons, the trial court, sitting as the trier of fact, rejected such a view of the evidence. "If there was an arrest it came subsequent to the frisk." See Appendix B, p. 44. The Court of Appeals held that the detention did not constitute an arrest "in the technical criminal law sense." See Appendix C, pp. 50, 52.

conduct in protecting his own safety for probable cause,[50] in order to justify the accompanying search for weapons.[51] And although the original reason for the detention and interrogation was to prevent a *possible* robbery *in futuro*, and the accompanying search was justified as reasonable conduct by the police officer "to protect himself from a *possible* assault with a dangerous weapon," the yield of the non-search incidental to the non-arrest resulted in the conviction of petitioners of neither robbery nor armed assault, but of an entirely different felony—carrying a concealed weapon. Of such spiderwebs are the convictions in the case at bar fashioned.

Amicus urges that (I) the detention and interrogation was an arrest within the purview of the Fourth Amendment, as applied to the states through the Fourteenth, and that it was invalid by operation of that same constitutional authority; (II) the "frisk" for weapons was a search within the meaning of the Fourth Amendment, as applied to the states through the Fourteenth, and invalid by that

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[50] It is of more than passing interest to note that this Court has never used the "reasonableness" test to take the place of probable cause as a necessary element of a lawful arrest or search. In United States v. Rabinowitz, 339 U. S. 56 (1950), this Court enunciated the "reasonableness" test solely for the purpose of determining whether, after an arrest pursuant to a valid warrant, a showing of probable cause to search was sufficient to preclude the necessity of obtaining a search warrant as well.

[51] The trial court noted that "a police officer * * * will not be permitted to stop and frisk an individual simply because he has a suspicion" unless accompanied by "*reasonable circumstances* justifying a frisk." Such circumstances include "reasonable suspicion" and "[fear] for his own personal protection." See Appendix B, pp. 42, 43. In the Court of Appeals, the "frisk for dangerous weapons" was held to be "valid as an incident to a valid inquiry by the police." It was held "*not unreasonable* for a policeman * * * to frisk * * * the person in order to protect himself from a possible assault with a dangerous weapon." (Throughout this brief any italicizing of quoted material has been supplied by *amicus* unless otherwise indicated.)

same authority; and (III) the seizure of the yield of the search for use in evidence against the petitioners in a subsequent prosecution cannot be justified by the public policy of protecting the safety of police officers.

Each of these contentions will be considered in sequence below.

I.

THE DETENTION AND INTERROGATION WAS AN ILLEGAL ARREST.

The Fourth Amendment has been interpreted to prohibit a warrantless arrest without "probable cause." [52] The requirement of probable cause is a compromise which has been found for accommodating the citizen's basic right to privacy and the need for effective criminal investigation and law enforcement. "Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." [53] And the rule applied to the states through the Due Process Clause of the Fourteenth Amendment is the same.[54]

Mere suspicion on the part of the arresting officer does not rise to the dignity of probable cause. Probable cause exists where the facts and circumstances within the officer's knowledge, and of which he had trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been

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[52] See Wong Sun v. United States, 371 U. S. 471 (1963); Rios v. United States, 364 U. S. 253 (1960); Henry v. United States, 361 U. S. 98 (1959); Draper v. United States, 358 U. S. 307 (1959); Brinegar v. United States, 338 U. S. 160 (1949) and Carroll v. United States, 267 U. S. 132 (1925).

[53] Brinegar v. United States, 338 U. S. 160, 176 (1949).

[54] Wolf v. Colorado, 338 U. S. 25 (1949); Beck v. Ohio, 379 U. S. 89 (1964).

or is being committed.[55] It is clear that, unless it can be shown that the arresting officer, *prior to the arrest of the accused*, had probable cause to believe that the accused was guilty of an offense, the arrest is invalid, and the fruits of the search of his person made incidental thereto must be suppressed.[56] It therefore becomes critical to determine the precise moment when the arrest took place.[57]

It will be recalled that in the case at bar, the arresting officer observed petitioners walking back and forth in front of a row of stores on a busy street in the downtown business district. It was broad daylight in the early afternoon of a business day. Although their conduct was innocuous, or, at very most, ambiguous, and he had no other information about them, the officer suspected that they were about to rob one of the stores. He left his vantage point about 300 feet away, ran across the street, and accosted petitioners, who were talking to a third man on the sidewalk some little distance from the place where they had been originally observed. He identified himself as a police officer, and asked the three men their names. They answered quickly. Whereupon the officer grasped petitioner

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[55] See Beck v. Ohio, 379 U. S. 89 (1964); Henry v. United States, 361 U. S. 98 (1959); Brinegar v. United States, 338 U. S. 160 (1949); Carroll v. United States, 267 U. S. 132 (1925).

[56] Beck v. Ohio, 379 U. S. 89 (1964); Rios v. United States, 364 U. S. 253 (1960); Henry v. United States, 361 U. S. 98 (1959); City of Lakewood v. Smith, 1 Ohio St. 2d 128, 205 N. E. 2d 388; 30 Ohio Op. 2d 482 (1965).

[57] Although this question is of obvious importance, it was rarely litigated prior to the imposition of the exclusionary rule of Mapp v. Ohio, 367 U. S. 643 (1961). Until the Mapp decision, evidence seized incident to an unconstitutional arrest by state officers could be introduced in state courts. Wolf v. Colorado, 338 U. S. 25 (1949). Furthermore, such evidence could be used retroactively to provide probable cause for the arrest. See Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 Fordham L. Rev. 211, footnote 1 (1964).

Terry, spun him around, and patted the outside of his topcoat. He felt the outlines of a gun in the inside pocket of Terry's coat, reached in and felt the handle of the gun, pulled the topcoat off him and seized the weapon. He ordered all three men into a nearby store, concedes that by this time all were under arrest, and searched the other two men. The search of petitioner Chilton yielded another gun, which the officer confiscated.

Upon these undisputed facts, at what point did the arrest take place? At the moment that the arresting officer stopped the petitioners and the third man for the purpose of interrogating them? At the moment he first laid hands on petitioner Terry, prior to the "frisk" for weapons? Or at the moment when he ordered the three men into the nearby store, immediately before searching the other two men? This is a critical constitutional determination for the purpose of testing probable cause because of the varying state of knowledge of the arresting officer at each stage of events.

There is ample authority for the contention that at the moment the three men were first stopped and questioned by a police officer who identified himself as such—at the moment they were restrained of their liberty of motion by a law enforcement authority of the state—they were under arrest for constitutional purposes. *Henry v. United States*, 361 U. S. 98, 103 (1959) so holds. Those who seek to avoid the consequences of the *Henry* "moment of restriction of liberty" rule of arrest (including the Court of Appeals below)[58] urge that the Government concession in *Henry* that the arrest took place at the moment of the "stop" limits that decision to its particular facts. Such attempts to dilute the holding of *Henry* fail to consider the

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[58] See Appendix C, p. 52.

fact that although the Court was not bound by the Government's concession,[59] it viewed the facts of the case independently and concluded that "[w]hen the officers interrupted the two men and *restricted their liberty of movement*, the arrest * * * was complete." [60] There is substantial lower court authority to support this interpretation of *Henry*.[61]

The determination that the arrest of petitioners took place at the moment they were stopped and interrogated by a police officer under a clear statement of his police authority to do so, is supported by the foregoing case law. The failure or refusal of some courts which take a contrary view[62] to recognize the authority of *Henry v.*

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[59] 361 U. S. at 105 (Clark, J., dissenting).

[60] *Id.* at 103. Cf. Rios v. United States, 364 U. S. 253 (1960).

[61] See United States v. Baxter, 361 F. 2d 116 (6th Cir. 1966), cert. denied 87 S. Ct. 79 (1966); Kelly v. United States, 298 F. 2d 310 (D. C. Cir. 1961); Coleman v. United States, 295 F. 2d 555 (D. C. Cir. 1961), *cert. denied* 369 U. S. 813 (1962); Green v. United States, 259 F. 2d 180 (D. C. Cir. 1958), *cert. denied*, 359 U. S. 917 (1959); United States v. Scott, 149 F. Supp. 837 (D. C. D. C. 1957); Long v. Ansell, 69 F. 2d 386 (D. C. Cir. 1934).

Also see Foote, *The Fourth Amendment: Obstacle or Necessity and the Law of Arrest*, 51 J. Crim. L., C. & P. S. 402 (1960).

[62] *Federal Cases:* United States v. Thomas, 250 F. Supp. 771 (S. D. N. Y. 1966); United States v. Vita, 294 F. 2d 524 (2d Cir. 1961), cert. denied 369 U. S. 823 (1962); Busby v. United States, 296 F. 2d 328 (9th Cir. 1961); United States v. Bonanno, 180 F. Supp. 71 (S. D. N. Y. 1960) *rev'd other grounds sub nom.*; United States v. Bufalino, 285 F. 2d 408 (2d Cir. 1960). *State Cases:* People v. Rivera, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied 379 U. S. 978 (1965); Goss v. State, 390 P. 2d 220 (Alaska) cert. denied 379 U. S. 859 (1964); State ex rel. Branchaud v. Hedman, 269 Minn. 375, 130 N. W. 2d 628 (1964); State v. Hope, 85 N. J. Super. 551, 205 A. 2d 457 (App. Div. 1964). Several states permit police detention and interrogation without probable cause by statute. See Delaware Code Ann. Title 11, Sections 1902-03 (1953); New Hampshire Revised Stat. Ann., Sections 594: 2-3 (1955); Rhode Island Gen. Laws Ann. Section 12-7 and 2 (1956); Mass. Gen. Laws, Ch. 41, Sec. 98 (1932); New York Code of Crim. Proc. Sec. 180-a.

United States as binding on the question of when an arrest takes place, provides abundant reason, if this case presented no other compelling constitutional issues, for this Court to grant the application for certiorari in the case at bar. The juxtaposition of *Beck v. Ohio,* which applied federal standards of arrest to the states, and *Henry v. United States,* which set the standard as to when an arrest is effective, compel a square holding by this Court that any police restraint upon the liberty of any person, no matter how short its duration, is an arrest within Fourth Amendment strictures against illegal seizure of the person, and, if unaccompanied by probable cause, such arrest is violative of the Fourth and Fourteenth Amendments.

It requires little further discussion on this point but to note that the application of the *Henry* arrest rule to state criminal prosecutions via *Beck* compels a holding that the arrest in the case at bar was unconstitutional. For, in the instant case, the most charitable view of the arresting officer's knowledge of facts related to petitioners' guilt at the time of their original on-the-street detention is that, based upon his observation of conduct which was at least as susceptible to an innocent interpretation as a guilty one, he had a good faith suspicion, without objective corroboration of any sort, that petitioners were about to commit a crime. This Court has clearly and frequently pointed

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(Continued from preceding page)

Although Bonanno distinguished between detention and arrest, that decision was reversed on other grounds in Bufalino. In its opinion, the Bufalino court was careful to point out that it did not pass on the trial judge's ruling upholding the legality of the police procedures. *Id.* at 413, footnote 6. Furthermore, Judge Clark's concurring opinion notes that "the court's rulings supporting admissibility in United States v. Bonanno, * * * would seem at variance with Henry v. United States, * * * and the rationale there set forth * * *." *Id.* at 420, footnote 3.

out that neither simple belief,[63] good faith,[64] mere suspicion,[65] common rumor or even "strong reason to suspect" [66] on the part of the arresting officer is sufficient to demonstrate probable cause.

Should the Court depart from its position in *Henry* and rule that on-the-street detention is a form of sub-arrest beneath Fourth Amendment considerations, and that the detention of petitioners in the case at bar somehow survives constitutional attack, the illegality of the arrest here may be demonstrated by another route.

Whatever its determination as to the constructive custody in which a police officer holds a suspect when he stops and interrogates him, there can be little doubt that once the officer lays his hands on the suspect and uses force to exact involutary movement from him, philosophic and semantic distinctions between "arrest" and "detention" become (if they have not always been) hopelessly irrelevant.[67] On the instant facts, when, immediately after petitioner Terry gave his name to the arresting officer, the police officer grasped him with both hands and turned him around, the constructive physical restraint became actual. The arrest at that moment can scarcely be denied.

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[63] Nathanson v. United States, 290 U. S. 41 (1933).

[64] Henry v. United States, 361 U. S. 98 (1959).

[65] Henry v. United States, 361 U. S. 98 (1959); Draper v. United States, 358 U. S. 307 (1959); Brinegar v. United States, 338 U. S. 160 (1949).

[66] *Ibid.*

[67] See this language in Henry v. United States, 361 U. S. 98, 104 (1959): "Under our system suspicion is not enough for an officer *to lay hands on a citizen.*" And see Green v. United States, 259 F. 2d 180, 182 (D. C. Cir. 1958), *cert. denied,* 359 U. S. 917 (1959): "Had he remained standing where he was first accosted, or had he merely refused to talk, the police would have lacked probable cause either to arrest or to search him. The officers would have had no justifiable reason *to lay hands upon him.*"

So far as probable cause is concerned, the officer had but one more fact at the moment after his assertion of physical control over petitioner Terry than he had at the moment of original interrogation: the fact that when asked a question by a police officer the suspects gave a civil and relevant response, unaccompanied by obvious evasiveness, threatened or actual violence, or by flight—all of which admittedly may be factors bearing on probable cause.[68] Because of the non-violent and lawful nature of their responses, it may be concluded that the officer had even *less* reason to believe petitioners' guilt at the time he grasped petitioner Terry and spun him around than he had at the time of the original interrogation when he could not have known whether he would get a peaceable response from the suspects, or any.

Even after the arresting officer obtained what was undeniably probable cause against petitioner Terry (when he felt the weapon in Terry's clothing after his illegal arrest), the record is barren of any information whatever giving him probable cause to arrest petitioner Chilton and the other man, whose admitted arrests immediately followed.

If probable cause is a workable and useful concept to balance the citizen's right of privacy against police necessity, it ought not be relegated to a caricature of a stricture against law enforcement excesses, a status which must surely follow if police officers, with constitutional sanction, are permitted—rather, encouraged—to compel suspects, during a period of non-arrest, to disgorge incriminating information and evidence which will raise their suspicions to probable cause and thereby validate a

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[68] Husty v. United States, 282 U. S. 694 (1931); Green v. United States, 259 F. 2d 180 (D. C. Cir. 1958).

subsequent arrest. It is too late in the day and too destructive of constitutional values to attempt to "justify the arrest by the search and at the same time justify the search by the arrest." *Johnson v. United States,* 333 U. S. 10, 15 (1947).

If the protections of privacy derived from the Fourth Amendment are to remain meaningful, if they are not to be diluted beyond recognition and beyond the legitimate needs of law enforcement, Fourth Amendment standards should be applied in each instance of governmental restraint of the person of its citizenry, no matter how fleeting, without the substitution of semantic devices for constitutional requirements. For careful analysis "exposes the thinness of the claim that investigative arrests are essential to public safety. On the contrary, the practice of investigative arrests breeds resentment, discourages thorough police work, and sets an official standard of lawlessness." [69]

II.

THE FRISK FOR WEAPONS WAS AN ILLEGAL SEARCH.

Amicus has urged above (Argument I, *supra,* pp. 13-20) that the arrest, for purposes of constitutional analysis, occurred before the "frisk" for weapons, that it was an invalid arrest in the absense of probable cause to make it, and that the suppression of evidence obtained incidental thereto was thereafter constitutionally compelled. If the Court so holds, the legal analysis in this case is over. For it has never been seriously contended that a non-consensual warrantless search, without independent probable cause to search, may be justified by a contemporaneous unconstitutional arrest.

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[69] Joint Comm. on the District of Columbia, *Crime in the District of Columbia,* H. R. Rep. No. 176, 89th Cong., 1st Sess. 139 (1965) (minority views).

But even if this Court should somehow affirm the position taken by the courts below, and hold that the arrest occurred after the "frisk" for weapons had revealed enough information to the arresting officer to give him probable cause to support the subsequent arrest, the proponents of "stop and frisk" police conduct have yet another constitutional hurdle to overcome. Unless they can justify the "frisk" itself, the use in evidence of the "fruit of the frisk" [70] must be constitutionally forbidden, regardless of whether the arrest is determined to have taken place before or after the frisk, and regardless of whether the arrest was valid or invalid. For probable cause to justify any arrest in this case, early or late, must ultimately depend upon the information acquired by the arresting officer during the frisk itself.[71]

For those who seek to defend "stop and frisk" police activity against constitutional attack, the attempted justification of the "frisk" in constitutional terms is even more tenuous than constitutional sanction of the "stop." [72] The desperate attempt to exempt the "frisk" from the Fourth Amendment protections which have been evolving from this Court's decisions on search and seizure law

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[70] This poetic language is that of the trial court. See Appendix B, p. 43.

[71] It cannot be denied that the arresting officer had probable cause to arrest for carrying a concealed weapon once he felt the outline of the gun through petitioner Terry's topcoat. But since an earlier arrest must have been invalid as without probable cause, and a subsequent arrest could only have been valid if the information acquired by the arresting officer was *legally* acquired during the frisk, the constitutionality of the seizure of the weapon and its later use in evidence against the accused stands or falls on the independent validity of the "frisk." People v. Rivera, 14 N. Y. 2d 441, 449, 201 N. E. 2d 32, 37, 252 N. Y. S. 2d 458, 465, n. 1 (1964) (Fuld, J., dissenting), cert. denied 379 U. S. 978 (1964).

[72] Although the "stop"—arrest distinction is difficult enough. See Argument I, *supra*, pp. 15-18.

since *Boyd v. United States*, 116 U. S. 616 (1886)[73] has taken two forms. *First*, by semantic alchemy, it is denied that a "frisk" is a search and that the confiscation of the yield of the "frisk" is a seizure within the operation of the Fourth Amendment, even though such fruits may ultimately be introduced in evidence against the accused.[74] *Second*, even where it is conceded that the "stop" is a seizure of the person within the meaning of the Fourth Amendment and a "frisk" is a search within the conception of that same constitutional authority, both the "stop" and incidental "frisk" are sought to be justified, in the absence of probable cause, as "reasonable searches and seizures," under a test of "reasonableness" which, it is argued, is an interchangeable alternative to the requirement of probable cause.[75]

Each of these arguments will be discussed below.

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[73] The decided case law makes it clear why the application of Fourth Amendment doctrine to "stop and frisk" police conduct compels its rejection as unconstitutional. This Court has never constitutionally permitted a search in the absence of a showing of either probable cause to search, Wong Sun v. United States, 371 U. S. 471 (1963); Carroll v. United States, 267 U. S. 132 (1925); or probable cause to arrest, Beck v. Ohio, 379 U. S. 89 (1964); United States v. Rabinowitz, 339 U. S. 56 (1950). Where probable cause exists, no resort to such esoteric concepts as "stop and frisk" is necessary. Where probable cause is absent, no constitutional attack can be withstood.

[74] See People v. Rivera, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied 379 U. S. 978 (1964). And see the trial court's distinction in the instant case between a "frisking" which "is strictly for the protection of the officer's person and his life" and does not "go into [the] pockets" of the suspect, and a search which "[goes] into their pockets and produces evidence, as an example, narcotics or illegal slips * * *." Appendix B, p. 42.

[75] The American Law Institute has taken this view. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft. No. 1, 1966).

A.

A "Frisk" Is a Search Within the Meaning of the Fourth Amendment.

The suggestion that a police officer who runs his hands over the *outside* clothing on the body of a suspect in the public street without his consent for the express purpose of determining what the suspect has concealed *inside* his clothing is conducting, not a *search*, but a *frisk*—a form of non-search or sub-search which defies Fourth Amendment proscription—would be ludicrous if its consequences were not so destructive of "the right to be let alone."

Judge Fuld, dissenting in *Rivera*,[76] has properly destroyed this attempted distinction:

> "This is nothing but an exercise in semantics; a search by any other name is still a search. Viewed in the perspective of constitutionally protected interests, a police tactic—call it a search or, more euphemistically, a 'frisk'—which leads to discovery of a gun in an individual's pocket by trespassing on his person is indisputably an invasion of privacy. A 'frisk' is a species of search and, in point of fact, both decisions and dictionaries so define it * * *.
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> "Free men should no more be subject to having the police run their hands over their pockets than through them. Neither the Fourth Amendment nor, for that matter, the common law of tort distinguishes * * * between a cursory search and a more elaborate one. In both instances, it is the slightest touching which is condemned, and the reason for this is the insult to individuality, to individual liberty, is as grave and as objectionable in the one case as in the other."[77]

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[76] Olmstead v. United States, 277 U. S. 438, 478 (1928) Brandeis, J., dissenting).

[77] People v. Rivera, 14 N. Y. 2d 441, 449-450, 201 N. E. 2d 32, 37, 252 N. Y. S. 2d 458, 466 (1964), cert. denied 379 U. S. 978 (1964).

Judge Fuld's dissent is wholly compatible with this Court's previously stated attitudes on the breadth of privacy of the citizen which is protected against governmental intrusion. Ever since this Court's decision in *Olmstead v. United States*, 277 U. S. 438 (1928), the litmus of governmental violation of the citizen's Fourth Amendment right of privacy has been whether there was a *physical trespass* into the protected zone. Even the slightest physical trespass is sufficient to evoke the protections of the Fourth Amendment,[78] whether accompanied by rummaging or not.[79] In the instant case, the arresting officer grasped petitioner Terry, spun him around and patted his clothing. The physical trespass to the person—the insult to his privacy—is apparent.

The courts below in the instant case further attempted to justify the distinction between a "frisk" and a search by noting the officer's primary purpose in invading the privacy of the suspect. "A search is primarily for the purpose of trying to obtain evidence," while "a frisking is strictly for the protection of the officer's person and his life." [80] "[P]olice officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary

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[78] *E.g., Silverman v. United States*, 365 U. S. 505 (1961) (spike of "spike mike" extended several inches into party wall of accused; held: Fourth Amendment violated); Regalado v. California, 374 U. S. 497 (1963) reversing 193 Cal. App. 2d 437 (1961) (peeping through hole bored in hotel room door; held: Fourth Amendment violated); Clinton v. Virginia, 377 U. S. 158 (1964), *reversing* 204 Va. 275, 130 S. E. 2d 437 (1963) (microphone not driven into party wall, but merely stuck in it by a thumbtack; held: Fourth Amendment violated); cf., Katz v. United States, 369 F. 2d 130 (9th Cir. 1966) *cert. granted* 35 U. S. L. Week 3262 (No. 895, Oct. term 1966).

[79] Chapman v. United States, 365 U. S. 610 (1961); and see United States v. Merritt, 293 F. 2d 742 (3rd Cir. 1961); Work v. United States, 243 F. 2d 660 (D. C. Cir. 1957).

[80] See opinion of trial court, Appendix B, p. 42.

fishing expedition." [81] To make distinctions in constitutional treatment turn upon the police officer's subjective motive—whether in fact he seeks a weapon or other evidence—is to disregard constitutional history and make a shambles of Fourth Amendment protections. For this Court has "had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States v. DiRe*, 332 U. S. 581, 595 (1948). And it is clear that once "frisking" for weapons is authorized, seizure of other evidence during this sanctioned invasion of privacy will soon follow, and with judicial blessing. See *Harris v. United States*, 331 U. S. 145 (1947).

The experience in New York following the justification of a police "frisk" for weapons in the absence of probable cause to arrest or search in *People v. Rivera* is illustrative of the danger. After permitting the patting of the outer clothing for weapons as a "frisk" which was "justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search" [82] the New York courts justified, in identical fashion, the "frisk" of a brief case belonging to a suspect who was already in the custody of three police officers in an automobile [83] and the "frisk" of an entire automobile.[84] Moreover, "frisking" justified as a search for dangerous weapons to protect the life of the arresting officer has been extended, with judicial approval, to a

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[81] See opinion of court of appeals, Appendix C, p. 53.

[82] People v. Rivera, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied 379 U. S. 978 (1965).

[83] People v. Pugach, 15 N. Y. 2d 65, 204 N. E. 2d 176 (1964) cert. denied 380 U. S. 936 (1965).

[84] People v. Cassese, 263 N. Y. S. 2d 734, 47 Misc. 2d 1031 (N. Y. City Crim. Ct. 1965).

general search of the person of the suspect for other evidence.[85] The experience in California is not dissimilar.[86] The development of the case law in these two states demonstrates how, all too frequently, "a hint becomes a suggestion, is loosely turned into a dictum and finally elevated to a decision." [87]

The attempt to withdraw searches of a particular variety from the operation of the Fourth Amendment by a process of nomenclature and classification is both sterile and dangerous. Calling a search a "frisk" and excluding it from Fourth Amendment controls because of its label is a form of non-analysis which will survive neither logic, common experience, nor the decided case law of this Court in the area of individual privacy. The greatest danger of such a device, however, is its destructive effect upon one of the basic guarantees which a society, if it is to remain free, must provide each citizen—the right to walk the public streets secure in the knowledge that, without probable cause to do so, the police cannot put their hands on his body for any purpose.

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[85] People v. Sibron, 18 N. Y. 2d 603, 219 N. E. 2d 196 (1966) probable juris. noted 35 U. S. L. Week 3321 (U. S. March 14, 1967) (package of heroin); People v. Peters, 18 N. Y. 2d 638, 219 N. E. 2d 595 (1966) (burglar's tools); People v. Norris, 258 N. Y. S. 2d 967, 46 Misc. 2d 44 (Sup. Ct. Kings County, 1965) (26 marijuana cigarettes); People v. Reason, 35 U. S. L. Week 2362 (N. Y. Sup. Ct. Dec. 21, 1966) (narcotics in a tin box).

[86] E.g., People v. Machel, 234 Cal. App. 2d 37, 44 Cal. Reptr. 126 (1st Dist. Ct. of App. 1965), *cert. denied*, 382 U. S. 839 (dictum) (three marijuana cigarettes); People v. Garrett, 238 Cal. App. 2d 292, 47 Cal. Reptr. 731 (3rd Dist. Ct. App. 1965) (stolen coins).

[87] United States v. Rabinowitz, 339 U. S. 56, 75, (1950) (Frankfurter, J., dissenting).

B.

A "Frisk" in the Absence of Probable Cause Is Not a Reasonable Search Within the Meaning of the Fourth Amendment.

Once it has been determined that a frisk is, in fact and law, a search within the operation of the Fourth Amendment, those who seek constitutional justification for police frisks without either a contemporaneous valid arrest, a search warrant or probable cause to search, urge that such frisks are "reasonable" police conduct; since the Fourth Amendment prohibits only "unreasonable searches and seizures," the reasonableness of the police conduct is a constitutionally adequate substitute for probable cause, and the "frisk" is therefore (the argument runs) a valid search.

This contention has novelty, if not authority, to support it. But *amicus* urges not only a dearth of case support for such a claim, but, more important, that the adoption of such a construction of the Fourth Amendment would effectively eviscerate the right of privacy it was designed to protect.

Our analysis must begin with the language of the Fourth Amendment itself.[88] It contains two clauses: a prohibition of unreasonable searches and seizures (referred to here as the "reasonableness" clause) and a description of the necessary attributes of a valid warrant (referred to here as the "warrants" clause). Because the relationship between these two clauses is not clear, either

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[88] "The right of the people to be secure in their *persons*, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated, and no *Warrants* shall issue but, upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. Amendment IV.

from the express language of the Fourth Amendment, or from its constitutional history, there has been some conflicting interpretation of their interacting effect upon each other in the decided cases.

In *Trupiano v. United States*,[89] this Court interpreted the "warrants" clause to be paramount to the "reasonableness" clause by holding that a search conducted without a warrant, where the police had adequate time and opportunity to obtain one, was not a "reasonable" search. Scarcely two years later, in *United States v. Rabinowitz*,[90] the Court reversed *Trupiano* and held the "reasonableness" clause to be of primary importance in determining when a search satisfied Fourth Amendment requirements. To substitute for the test of practicality of obtaining a search warrant, enunciated in *Trupiano*, the Court articulated a pluralistic rule of "reasonableness" of police conduct, of which practicality of obtaining a warrant was only a single factor. On the facts of *Rabinowitz*, this rule of reasonableness permitted the Court to find a valid search even though the police had ample opportunity to procure a warrant, but failed or refused to do so.

Regardless of the merits of the "reasonableness" test,[91] it is clear that it was designed solely for the purpose

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[89] 334 U. S. 699 (1948).

[90] 339 U. S. 56 (1950).

[91] See the biting dissent of Frankfurter, J. in Rabinowitz, 339 U. S. 56, 83 (1950): "There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant * * *. It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable * * *." And see United States v. Ventresca, 380 U. S. 102 (1965); Beck v. Ohio, 379 U. S. 89 (1964); Preston v. United States, 376 U. S. 364 (1964); and Chapman v. United States, 365 U. S. 610 (1961) in which the *Trupiano* requirement of police necessity to excuse failure to obtain a search warrant appears to be re-emerging.

of determining *when a warrantless search might be constitutionally justified* and *not as an excuse for probable cause*. The difference between the two approaches involved the relative importance assigned to procuring a warrant. Never was there any suggestion that any search *in the absence of probable cause* could meet the criterion of reasonableness. And for good reason.

If the "warrants" clause requires a *warrant* to be based upon probable cause in order to be valid, how could a lesser standard be applied to *warrantless* search by virtue of the "reasonableness" clause? Why would any police officer ever elect to seek a warrant before making a search if he were held to a lesser standard in a warrantless search than in a search pursuant to a valid warrant? If the framers did not regard a warrant as "a requirement for a piece of paper" [92] but as an important bulwark against government invasion of privacy, and if probable cause is so essential an element of a valid warrant, why provide a means of bypassing the probable cause requirement of the "warrants" clause in the "reasonableness" clause which immediately precedes it?

The posing of these questions amply refutes the strained interpretation of the Fourth Amendment which would limit the requirement of probable cause only to searches with a warrant. The only interpretation of the Fourth Amendment which conforms to this Court's past decisions and which leaves it a vital document in the protection of individual privacy and human dignity is that, all searches, with or without a warrant, are unreasonable unless accompanied by probable cause.

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[92] United States v. Rabinowitz, 339 U. S. 56, 69 (1950) (Frankfurter, J., dissenting).

Thus, our analysis of the "frisk" as a Fourth Amendment violation returns to its place of beginning. A frisk must be a search as that term is used in the Fourth Amendment. And as a search it cannot be a reasonable search unless it is accompanied by probable cause to arrest or search. Since, in the case at bar, neither probable cause to arrest nor probable cause to search could be shown, except by use of the yield of the frisk itself, the frisk of petitioners was an unreasonable search and its yield should have been suppressed by command of the Fourth and Fourteenth Amendments. Although "wherever a culprit is caught red-handed * * * it is difficult to adopt and enforce a rule that would turn him loose," [93] the preservation of Fourth Amendment values should be sufficient impetus to cause the Court to do its duty.

III.

PROTECTION OF POLICE OFFICERS CANNOT JUSTIFY THE USE OF THE YIELD OF THE FRISK IN EVIDENCE AGAINST PETITIONERS.

Amicus has demonstrated (Argument II, *supra*, pp. 20-30) that a frisk for weapons without probable cause to arrest or search is an unreasonable search expressly prohibited by the Fourth Amendment. It follows that the yield of such a search must be suppressed by virtue of the exclusionary rule made applicable to the states in *Mapp v. Ohio*, 367 U. S. 643 (1961).

But the sponsors of exceptional constitutional treatment for such frisks urge that society's substantial interest in protecting the lives of its law enforcement authorities in the course of their investigation of crime compel relaxation of settled constitutional principles to achieve this im-

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[93] Draper v. United States, 358 U. S. 307, 314 (1959) (Douglas, J., dissenting).

portant societal purpose. They urge that such searches are necessary for crime investigation and police protection, that they are therefore not constitutionally infirm, and that, as a result, the exclusionary rule does not reach their fruits. Because everyone is quite correctly concerned with the safety of the police in the performance of their dangerous and highly important function of preserving order, the argument has a certain surface appeal.

Upon closer inspection, however, the argument disintegrates entirely. For it is apparent that long after any danger to the police officer is over, the use of the seized evidence to convict the suspect in a subsequent prosecution, made possible by a claim of police urgency, achieves an otherwise unconstitutional result under the most non-emergency conditions. To allow government to profit beyond its legitimate interest in a narrow exception to a rule of broad constitutional prohibition is to pay a reward for constitutional violation.

Amicus contends that (A) adequate exceptions for police necessity already exist in the Fourth Amendment case law, and that the addition of new ones in the "stop and frisk" sphere are not necessary for the protection of legitimate police interests, (B) public policy which permits the otherwise unconstitutional police searches to achieve a limited object—the protection of police safety—is in no way furthered by admitting the yield of such searches in evidence to convict the accused in subsequent criminal proceedings, and (C) as a practical matter, the use in evidence of the yield of searches made in violation of clear Fourth Amendment principle would provide great incentive for police officers, under the guise of self-protection, to make general searches of the person, thus frustrating the great purposes of the Fourth Amendment which the exclusionary rule was designed to protect.

Each of these contentions will be considered below.

A.

There Is No Legitimate Police Need for the "Frisk" Exception to Fourth Amendment Protections.

When police necessity is urged as a ground for legitimizing frisks without probable cause, the listener has the unerring feeling that he has heard the argument somewhere before. A casual search (or frisk) through this Court's decided cases reveals the source of this *déjà vu* impression. For it was precisely this argument that was made to obtain this Court's approval of the warrantless search incidental to a valid arrest, an exception to the general requirement that searches must be by warrant.[94]

Originating as a dictum justifying the search of the person of an accused pursuant to valid arrest,[95] it was expanded to include the immediate place of arrest[96] and the entire four-room apartment of an accused who was arrested in one of the rooms.[97] Although the "incidental search" exception to the requirement of a warrant has gone far beyond its origins and, perhaps, its rationale,[98] there is

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[94] "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime * * *. This right to search and seize without a search warrant extends to things under the accused's immediate control * * * and, to an extent depending on the circumstances of the case, to the place where he is arrested * * *." Preston v. United States, 376 U. S. 364, 367 (1964). Also see Schmerber v. California, 384 U. S. 770 (1966); United States v. Ventresca, 380 U. S. 102 (1965); United States v. Rabinowitz, 339 U. S. 56 (1950); Harris v. United States, 331 U. S. 145 (1947); Marron v. United States, 275 U. S. 192 (1927); Agnello v. United States, 269 U. S. 20 (1925); and Weeks v. United States, 232 U. S. 383 (1914).

[95] Weeks v. United States, 232 U. S. 383 (1914).

[96] Agnello v. United States, 269 U. S. 20 (1925).

[97] Harris v. United States, 331 U. S. 145 (1947).

[98] See Justice Frankfurter's strong critique of the extension of the "incidental search" rule in his dissent in United States v. Rabinowitz, 339 U. S. 56, 68-86 (1950).

no denying the fact that it was originally conceived as a means of protecting the arresting officer against attack by concealed weapons and as a means of preventing the immediate destruction of fruits or instrumentalities of crime.[99]

Never, until the "stop and frisk" cases, however, has there been any claim that an officer may protect an *invalid* arrest or evidence for which he was *not* entitled to search.

Amicus submits that the warrantless search of the person and the area within his immediate control permitted incident to a contemporaneous valid arrest is sufficient recognition of the police officer's legitimate need to protect himself, without fashioning new exceptions to Fourth Amendment principle which would eliminate the need for "some valid basis in law [to justify] the intrusion" of arrest or search.[100]

B.

No Legitimate Public Policy Is Served by Allowing in Evidence the Fruits of a Search Which, But For the Protection of the Police Officer, Would Have Been an Unconstitutional Search.

It must be conceded at the outset that a warrantless search or frisk, although unconstitutional because of the absence of either probable cause to search or a lawful

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[99] "The rule allowing contemporaneous searches is justified * * * by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control." Preston v. United States, 376 U. S. 364, 367 (1964). Also see United States v. Rabinowitz, 339 U. S. 56 (Frankfurter dissent at page 72) (1950); Palmer v. United States, 203 F. 2d 66, 67 (D. C. Cir. 1953); and Note, 17 BAYLOR L. R. 312 (1965).

[100] Johnson v. United States, 333 U. S. 10, 17 (1948).

arrest, may, in fact, provide some measure of bodily protection to the searching officer if the suspect is carrying a weapon. For this reason, a society concerned for the welfare of the police may be reluctant, even if otherwise convinced, to brand police searches for self-protection—no matter what the illegality of the police officer's conduct or the seriousness of the invasion of privacy—illegal. *Amicus* is not here concerned with the labelling of such police conduct for general, moral or legal purposes. It urges only that such searches, if not accompanied by a valid arrest or probable cause, are unconstitutional for purposes of the exclusionary rule.

The legislatures may, in their judgment, elect to indemnify police officers against civil suits brought by persons whose privacy was thus invaded, or cloak them with other legal protections they deem necessary or desirable.[101]

But whether this Court or some other judicial authority chooses, for purposes of its own, to call such searches good or bad, or (by calling them non-searches) irrelevant, it is clear that, so far as the exclusionary rule is concerned, they are bad.[102] For once the weapon is found and confiscated, and the suspect is disarmed, the stated purpose of the search—the bodily protection of the police officer—has

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[101] Experience, however, suggests that existing remedies against police officers for illegal searches and seizures, apart from the use of the exclusionary rule itself, pose little threat to illegal police conduct. See Murphy, J., dissenting in Wolf v. Colorado, 338 U. S. 25, 41-44 (1949).

[102] *Amicus* does not wish to appear too sanguine about the prospect of unrestricted police frisks even in the absence of subsequent convictions based upon the incriminating evidence so obtained. Absent probable cause, they are invalid and this Court's clear statement to this effect would no doubt be useful. The clearest deterrent to such conduct, however, is the vigorous operation of the exclusionary rule, in order to frustrate any purpose of such a search other than the stated one—self-protection. See argument III (C), *infra*, pp. 35-37.

been accomplished.[103] The subsequent admission of the weapon or other fruits of the search furthers the protection of the police officer not one bit; it merely makes the government the beneficiary of a search which, but for a purpose which is no longer operative, would have been struck down as a Fourth Amendment violation. Such intellectual trickery, designed and enforced by governmental authority to bypass its own constitutional rules, breeds nothing but contempt for law and legalisms. By such technical and moral hypocrisy as this, those who have been brutalized by our society and who are already taking to the streets in ever-increasing numbers to effect social change, will be finally alienated from seeking redress of their grievances in more orderly fashion. This Court's obligation not to emasculate the exclusionary rule for the convenience of the police force is thus a matter of practical, as well as moral, necessity in a society in flux.

C.

The Deterrent Effect of Strict Application of the Exclusionary Rule Will Keep Invasions of Privacy to a Practical Minimum.

The Court of Appeals below has stood logic upon its head in pointing out, as part of its rationale for refusing to enforce it, that vigorous application of the exclusionary rule in the "stop and frisk" area will have no deterrent effect upon police officers who, not wishing to commit suicide, will continue to frisk suspects for weapons, no matter what courts choose to do with the resulting evi-

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[103] It is not here suggested that, even if the search is invalid, the officer is obliged to return dangerous weapons taken from the suspect. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U. S. 693 (1965).

dence.[104] Such reasoning does not consider the possibility that there may be some law enforcement personnel within the court's jurisdiction who, in an excess of zeal, might be inclined to engage in general exploratory searches of the persons of suspects for purposes of general harassment and to see what incriminating evidence they can find, even though they may have no reason at all to fear an assailant's bullet.[105] This premise of the Court is fully exposed to public view.[106] Those of us who are not as convinced that the police will use their vast power with such unanimous *bona fides*, but who adhere instead to the principle announced by this Court, that "[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted," [107] must disassociate ourselves from the

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[104] Paraphrasing will not do justice to the reasoning of the Court of Appeals on this point. "The Mapp exclusionary rule was imposed upon the states not because of some command inherent in the fourth amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the fourth amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in mind this raison d' etre of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. *A judicial rule rendering evidence produced as a result of a frisk inadmissible would fail to deter the police from frisking suspects believed to be armed as police frisk for their own protection rather than for the purpose of looking for evidence.* A rule of admissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty." See Appendix C, p. 55.

[105] *Amicus* means no disrespect to local law enforcement authorities but is unable to accept the obverse supposition that all police officers who would entertain such thoughts are presently employed in New York and California. See cases cited in footnotes 85, 86, *supra*.

[106] The Court of Appeals opinion disingenuously notes that "police officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary fishing expedition." See Appendix C, p. 53.

[107] McDonald v. United States, 335 U. S. 451, 456 (1948).

rosy view of law enforcement embraced by the Court of Appeals.

Amicus is constrained to observe that had police officers been such staunch adherents to the constitutional limitations imposed upon their conduct as the Court of Appeals supposes, the exclusionary rule of *Mapp v. Ohio*[108] and the restrictions upon police conduct which followed *Mapp*[109] would have been totally unnecessary.

Assuming therefore, that some general exploratory searches might result under the guise of self-protection, it seems perfectly clear that the incentive for such unconstitutional police conduct would be materially reduced by vigorous application of the Fourth Amendment exclusionary rule. If law enforcement authorities know that weapons and other evidence seized during the course of an unconstitutional frisk will be inexorably suppressed by constitutional command, the number of unconstitutional invasions of privacy will be reduced, at very least, to those instances where the officer genuinely fears for his safety.

And thus the threat of "stop and frisk" police procedures, another of the new devices "that have emerged from century to century wherever excessive power is sought by the few at the expense of the many" [110] will be laid to rest.

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[108] 367 U. S. 643 (1961).

[109] *E.g.*, Miranda v. Arizona, 384 U. S. 436 (1966); Escobedo v. Illinois, 378 U. S. 478 (1964); Massiah v. United States, 377 U. S. 201 (1964).

[110] Black, J., dissenting in Adamson v. California, 332 U. S. 46, 89 (1947).

CONCLUSION.

Amicus has urged the constitutional infirmity of the on-the-street detention as an illegal arrest, the invalidity of the accompanying "frisk" as an unreasonable search and the logical barrenness of the attempted justification of both in the name of crime prevention and the safety of the interrogating officer. Despite the clamor of the constabulary to the contrary, the highly critical area of on-the-street arrests and accompanying searches demands, no relaxation of Fourth Amendment standards, but vigorous adherence to them. Otherwise, "a method will have been devised by which the Fourth Amendment's prohibition against unreasonable searches and seizures may be evaded and the exclusionary rule of *Mapp v. Ohio,* * * * to a large extent, written off the books." [111]

Amicus joins in, and calls upon this Court to make its own, the stirring language of Judge Fuld:

> "* * * The loss of liberty entailed in authorizing a species of search on the basis of mere suspicion is too high a price to pay for the small measure of added security it promises. Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets.
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> "To what end security if liberty be sacrificed as its price? The privacy which the Constitution guarantees is assured to the best of men only if it is vouchsafed to the worst, however distasteful that may be. Thus, although the defendant before us undoubtedly merits

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[111] Fuld, J., dissenting in People v. Rivera, 14 N. Y. 2d 441, 448, 201 N. E. 2d 32, 36 (1964).

the punishment provided by law for carrying a concealed weapon, I venture that it is better that he go free than that we sanction a significant inroad on the rights of all our citizens." [112]

Respectfully submitted,

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[112] *Id.* at 452-453, 201 N. E. 2d at 39.

APPENDIX A.

JUDGMENT ENTRY OF SUPREME COURT OF OHIO.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutionel question exists herein.

APPENDIX B.

OPINION OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO.

FRIEDMAN, *J.* Gentlemen, it was suggested yesterday that briefs be filed and I stated that it was not necessary, in light of the fact that I have given this matter considerable attention as to the law, and the only question before me was to determine the facts so the proper law can be applied.

There is no question about the facts in this case, so I don't think it is necessary for me to repeat at length save and except to state that the police officer of many years of service and experience had observed the action of the defendants which indicated to him that they were casing a robbery.

There is no doubt in my mind that the officer, based upon his training, length of service, and experience as a police officer and detective, assigned in the area which he had been placed, and doing the job he had been doing, had reasonable cause to believe and to suspect that the defendants were conducting themselves suspiciously and some interrogation should be made of their action.

The Supreme Court of the United States has in many cases of recent years expressed itself clearly and distinctly that a general search and seizure is in violation of the Fourth Amendment unless the search is done with a proper warrant from the court, or if the search is made in connection with a lawful arrest and is contemporaneous and incidental to such arrest. *Henry v. U. S.*, 361 U. S., 98, 4 L. Ed. (2d), 134. *Ker v. California*, 374 U. S., 23, 10 L. Ed. (2d), 726. *Mapp v. Ohio*, 367 U. S., 643, 6 L. Ed. (2d) 1081.

There is no evidence that any warrant had been issued for a search or frisk and I am not going to stretch the facts and say that there was a lawful arrest prior to the frisk of the defendants. I believe it would be stretching the facts beyond reasonable comprehension and foolhardy to say there was a lawful arrest, because there wasn't, from the facts as presented.

It has been frequently stated by the U. S. Supreme Court that a state may establish its own rules and standards pertaining to search and seizure so long as these rules and standards do not violate the substance and spirit of the Fourth Amendment. It would certainly follow that the same rule would apply to the problem of "stopping and frisking" of an individual by a police officer where the facts justify.

In the case of *Ker v. California*, 374 U. S., 323, 10 L. Ed. (2d), 726, the court pronounced: "A state is not precluded from developing workable rules governing searches to meet the practical demands of effective criminal investigation and law enforcement that does not violate the constitutional standards of what is reasonable search and seizure."

Our courts in Ohio have on many occasions expressed that a police officer has the right to stop a suspicious per-

son for the purpose of interrogation. Therefore, can it be said that the frisking of said person by the officer for the purpose of his own safety is a standard set by our state that is violative of the Fourth Amendment, or is it a proper guidance to meet the practical demands of effective criminal investigation and the safety of the officer performing his sworn duty? This Court believes that it is the latter view that would be prevailing and that such conduct would not be held as a violation of the Fourth Amendment.

We cannot forego and forget that police officers have a job to do, and they must do the job in connection with crime which has been on the increase.

At the same time a police officer cannot—as far as this Court is concerned—and will not be permitted to stop and frisk an individual simply because he has a suspicion, a mere suspicion, unless they are reasonable circumstances justifying a frisk.

This Court believes there is a distinction between stopping and frisking, and search and seizure.

A search is primarily for the purpose of trying to obtain evidence in connection with the commission of a crime, that the police officer may reasonably believe that a crime has been committed or might be committed.

A frisking is strictly for the protection of the officer's person and his life.

There was reasonable cause in this case for the officer, Detective McFadden, to approach these individuals and pat them. He approached them, and for his own protection frisked them. He did not go into their pockets. Had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure.

He merely tapped them about the outer part of their bodies to determine if they had any weapons or guns, for

his own personal protection, and by doing so he discovered that two of the three individuals had concealed guns, and the guns are the fruit of the frisk, and not of a search.

In the case of *People v. Rivera* (7/10/64) decided by New York Court of Appeals, 33 U. S. Law Week, 2044, July 28, 1964, the court stated that a policeman has the authority to stop and question a suspect. "Prompt inquiry into suspicious or unusual conduct is an indispensable power in the orderly government of large urban communities."

The frisk is essential to the stop for without the latter the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible.

In the case of *People v. Martin,* 46 Cal. (2d), 106, the court similarly upheld stop and frisk by an officer, and the court in effect stated the security of public order and lives of the police are to be weighed against a minor inconvenience and petty indignity.

I may say at this time, I am a great believer of the personal rights propounded by our Supreme Court, reiterated and reaffirmed, neglected over the years, and given to us under the Fourth Amendment, the Fourteenth Amendment, and other amendments of the U. S. and State Constitutions.

But police officers in a community also have rights under the Constitution, and rights given to them by virtue of their office, and one of their rights as I have indicated is the right when the circumstances justify and there is a reasonable suspicion, and for his own personal protection, to stop the individual or individuals and not search, but to frisk, to determine if there are weapons for his own personal safety; and finding the weapon by frisking is the fruit of the stop and frisk, in the same relation that the courts refer to the fruits of the crime on a search and seizure.

Ballard v. State, 43 Ohio St., 340; *Clark v. DeWalt*, 65 Ohio Law Abs., 193, 203.

I believe that I reiterate again that search and seizure law cannot be applied in this particular case, although Mr. Reuben Payne endeavored to show there was a lawful arrest, but the Court cannot agree. If there was an arrest it came subsequent to the frisk.

But as I have stated, and I repeat again, there is a distinction between a frisk and a search and seizure.

This matter is of great importance and of great concern, and I certainly hope that counsel will endeavor to have this question determined by the Appellate Courts, for it is most desirable that we have clearness with respect to this problem and that police officers know what they may do and can do in a stop and frisk matter.

The motion in each case is overruled, and exception to the defendants. It is so ordered.

APPENDIX C.

OPINION OF THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY, EIGHTH DISTRICT.

SILBERT, *C. J.*

This is an appeal on questions of law from a judgment and sentence imposed by the Court of Common Pleas of Cuyahoga County.

John W. Terry, the appellant herein, was indicted on a charge of carrying a concealed weapon, in violation of Section 2923.01, Revised Code. A pre-trial motion to suppress the evidence was denied, and, upon a plea of not guilty, the court, sitting without a jury, returned a verdict of guilty.

The relevant facts are as follows: At approximately 2:30 in the afternoon of October 31, 1963, a Cleveland detective with thirty-nine years of experience observed two persons, later identified as John W. Terry and Richard D. Chilton, engaged in behavior, on the corner of East 14th Street and Euclid Avenue (in downtown Cleveland), which immediately attracted his attention and aroused his suspicions. Positioning himself across the street he observed these men for approximately ten to twelve minutes as they alternately left the corner on which the other was stationed, walked several hundred feet up the Huron Road block, peered into the window of either a jewelry store or an airline office and then returned to the corner to converse with the other. In turn the other person would leave the corner, repeat these actions and return to the corner. This procedure was repeated at least two to five times by both men. During this period, a third man, later identified as Carl Katz, approached the corner, spoke briefly to the two men and then departed.

After ten to twelve minutes of this behavior, Terry and Chilton left the corner and proceeded west on Euclid Avenue several hundred feet to where they again met Katz. The three then engaged in a conversation. As the detective testified: "* * * I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up * * *." With this belief in mind, the detective approached the three men, identified himself and asked for their names. Receiving only a mumbled response, the detective turned the defendant around, quickly "patted down" the outside of his clothing, and, perceiving a hard object in the inner breast pocket of his topcoat, inserted his hand and removed a fully loaded automatic. At this point the detective ordered the three men into a store, told them to face the wall and yelled to a store clerk to

"call the wagon." He then proceeded to "pat down" Chilton and upon perceiving a hard object in the lefthand pocket of his topcoat, inserted his hand and removed a fully loaded revolver. A similar "patting down" of Katz revealed nothing. The three men were then taken to the police station where Terry and Chilton were charged with carrying concealed weapons. Separate trials were ordered and after a motion to suppress was denied, the defendant Terry was convicted of a felony under Section 2923.01; Revised Code.

In the defendant appellant's brief, the following assignments of error are made:

> 1. The Court erred in not sustaining defendant's Motion to Suppress upon making its finding that the arrest herein was illegal.
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> 2. The Court erred in refusing to apply constitutional guarantees prohibiting illegal searches and seizures and substituting therefor a doctrine of stop and frisk. The fourth amendment to the United States Constitution provides:
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> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

This amendment prohibits an arrest without "probable cause," *Wong Sun vs. United States,* 371 U. S. 471 (1962), and is applied against the states through the fourteenth amendment. *Wolf vs. Colorado,* 338 U. S. 25 (1949).

However, the ambiguous nature of the word "arrest" and the issue of the right of the police to stop a person in a public street and question him under circumstances that

would reasonably call for investigation and inquiry present complex legal questions in the factual context of this case. Consequently, the initial question to be resolved is the authority of the detective in the circumstances shown here to stop and question the defendant. The validity of the subsequent police action and the determination of whether the detective had adequate "reasonable grounds" to make the arrest will hinge, in part, on the propriety of this initial inquiry.

The right of the proper authorities to stop and question persons in suspicious circumstances has its roots in early English practice where it was approved by the courts and the common law commentators. See, 2 *Hawkins, Pleas of the Crown,* 122, 129 (6th Ed. 1787): 2 *Hale, Pleas of the Crown,* 89, 96-97 (Amer. Ed. 1847): *Lawrence vs. Hedger,* 3 Taunt. 14, 128 Eng. Rep. 6 (C. P. 1810). Today, in several states, the authority of police officers to detain suspects for a reasonable time for questioning is granted by statute. E.g., N. Y. Code of Crim. Pro., Sec. 180A (1965 Supp.): Gen. Laws of R. I., Sec. 12-7-1 (1956): N. H. Rev. Stat. Ann., Ch. 594, Sec. 2 (1955): 11 Del. Ann. Code, Sec. 1902 (1953): Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942): Mass. Gen. Laws, Ch. 41, Sec. 98 (1961). In others, the right is recognized by court decisions. E.g., *People vs. Rivera,* 14 N. Y. (2d) 441 (1964): *Gisske vs. Sanders,* 9 Cal. App. 13 (1908): *People vs. Fagenkrantz,* 21 Ill. (2d) 75 (1961).

The United States Supreme Court, however, has never squarely decided whether the police may constitutionally stop and question a suspect without his consent in the absence of adequate grounds for arrest. However, the lower federal courts permit such field interrogations. See, *Henry vs. United States,* 361 U. S. 98, 106 (1959) (Clark, J. dissenting): *Brinegar vs. U. S.,* 338 U. S. 160, 178

(1949) (Burton, J. concurring): *Keiningham vs. United States*, 307 F. (2d) 632 (D. C. Cir. 1962), cert. den. 371 U. S. 949 (1963): *Busby vs. United States*, 296 F. (2d) 328 (9th Cir. 1961), cert. den. 369 U. S. 876 (1962). The cases also indicate that an officer may stop and question even though he has insufficient grounds to make an arrest. See, *Ellis vs. United States*, 264 F. (2d) 372 (D. C. Cir.), cert. den. 359 U. S. 998 (1959): *United States vs. Bonanno*, 180 F. Supp. 71, 78 (S. D. N. Y. 1960), rev'd on other grounds sub nom., *U. S. vs. Buffalino*, 285 F. (2d) 408 (2d Cir. 1960), cited with approval in *U. S. vs. Vita*, 294 F. (2d) 524, 530 (2d Cir. 1961).

Admittedly there is some division of authority on the legality of the right to stop and question; however, the better view seems to be that the stopping and questioning of suspicious persons is not prohibited by the Constitution. See, Note, 50 *Cornell L. Q.* 529, 533 (1965); *United States vs. Vita*, 294 F. (2d) 254 (2d Cir. 1961), cert. den. 369 U. S. 823 (1962). Of great persuasive authority do we consider the long line of California cases, decided under the rule of *People vs. Cahan*, 44 Cal. (2d) 434 (1955) in which this practice has been upheld. E.g., *People vs. Martin*, 46 Cal. (2d) 106 (1956); *People vs. Simon*, 45 Cal. (2d) 645 (1955); *People vs. Jones*, 176 Cal. App. (2d) 265 (1959): Also of great persuasive authority is the recent New York Court of Appeals decision in *People vs. Rivera*, 14 N. Y. (2d) 441 (1964) wherein this practice was also upheld. The courts of Ohio do not appear to have been squarely presented with this problem before. Therefore, we hold, in line with the great weight of authority, that a policeman may, under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest.

An individual who acts in a suspicious manner invites a preliminary inquiry by the proper authority. It does not unreasonably invade the individual's right to privacy to hold that the price of indulgence in suspicious behavior is a police inquiry. See, Traynor, Mapp vs. Ohio At Large In The Fifty States, 1962 *Duke L. J.* 319 (1962). Such a minor interference with personal liberty would "touch the right of privacy only to serve it well." *Traynor, supra,* at p. 334. If such questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest. The business of the police is not only to solve crimes after they occur, but to prevent them from taking place whenever it is legally possible. As stated by the New York Court of Appeals in the recent case of *People vs. Rivera, supra,* at p. 444:

> "The authority of the police to stop defendant and question him in the circumstances is perfectly clear. * * * Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were denied the right to such summary inquiry, a normal power and a necessary duty would be closed off."

Admittedly, this power to inquire may be abused. But the possibility of some future infraction should not require that the police should now be made powerless to make reasonable inquiries into suspicious behavior. If such abuses arise, we shall deal with them when the time comes. However, for the present, we hold that under the facts of this case, the detective's inquiry was reasonable under the conditions presented.

The appellant contends, however, that in the instant case, despite a right of inquiry, the arrest took place the moment the defendant was questioned by the detective. According to his argument, since the arrest took place at the time of the initial inquiry, there was at that time no adequate "reasonable grounds" to arrest and therefore under the exclusionary rule of *Mapp vs. Ohio,* 367 U. S. 643 (1961), the evidence must be suppressed. In support of this the defendant appellant's brief states: "Since the police officers in this case did not conduct any interrogation of the defendant and his companions other than an inquiry of their names * * * his purpose was to arrest and not to interrogate."

A principal cause of the difficulty here is the ambiguous nature of the word "arrest." Some courts have used the term "arrest" to signify the mere act of stopping or restraining a person. But the term "arrest" is more commonly used in the technical criminal law sense as the seizure of an alleged offender to answer for a crime. Note, 39 *N. Y. U. L. Rev.* 1093, 1096 (1964); *Commonwealth vs. Lehan,* 347 Mass. 197 (1964). The cases decided by the United States Supreme Court appear to have adopted this later usage, see *Carroll vs. United States,* 267 U. S. 132, 136 (1925); *Brinegar vs. United States,* 338 U. S. 160, 163 (1949), and it is the usage that has been adopted by the courts of Ohio. In 5 *Ohio Jurisprudence* (2d), Arrest, Sec. 3, p. 19, "arrest" is defined as follows:

> "An arrest as the term is used in criminal law signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime."

Similarly, in *State vs. Milam,* 108 Ohio App. 254, 268 (1959), this court quoted with approval the following definition of arrest:

"To constitute an 'arrest,' four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested."

It is readily apparent that a required element of an arrest is the *intent* of the officer to arrest. *United States vs. Bonanno, supra,* at 81-83. In the instant case, when the detective approached the defendant, he had, as shown by uncontradicted testimony, no intention at all to arrest, but only to inquire as to the defendant's activities. As stated in the record:

"Q. You observed these men for some ten to twelve minutes?

A. That's right.

Q. You observed the mode of conduct that you have described to us?

A. That's right.

Q. Did you, sir, as a police officer consider that you should investigate it?

A. I did.

* * *

Q. * * * after they left the corner and you observed them again in front of * * * (the store where the three men met) * * * what did you do?

A. I stopped them and went over and talked to them."

As to the exact time when the arrest took place, the record shows:

"Q. Then in this situation you considered them to be under arrest when you ordered the store people to call for the wagon?

A. That's right."

The defendant appellant, however, contends that the case of *Henry vs. United States,* 361 U. S. 98 (1959), estab-

lishes the point that the arrest in the instant case took place the moment the defendant was stopped by the detective. However, in the *Henry* case, the government conceded in the lower courts, see 259 F. (2d) 725 (7th Cir. 1958), and adhered to the concession before the Supreme Court, that the "arrest" occurred the moment the car in which Henry was riding was stopped by the federel agents. The Supreme Court in its opinion stated:

> "The prosecution conceded below, and adheres to that concession here, that the arrest took place when the federal agents stopped the car. This is our view of the facts of this particular case." 361 U. S. at 103.

When the opinion in *Henry* is read in light of this concession, it is apparent that the court was only deciding that, in the circumstances of that case, there was no probable cause to justify an "arrest" at the time the car in which Henry was riding was stopped. See, *United States vs. Bonanno, supra* at p. 85; *Busby vs. United States, supra.* Therefore, we hold that, in the instant case, the actual arrest did not occur until the defendant was ordered into the store after the loaded gun was discovered concealed on his person; Cf. *Rios vs. United States,* 364 U. S. 253 (1960).

Having determined that the police officer could validly inquire into the activities of the defendant, then it follows that the officer ought to be allowed to frisk, under some circumstances at least, to insure that the suspect does not possess a dangerous weapon which would put the safety of the officer in peril. See, Remington, The Law Relating to "On The Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General, 51 *J. Crim. L., C. & P. S.* 386, 391 (1960). What is the officer to do in this situation? Are we to allow him the right of inquiry and then, when this right is exercised, reward him with an assailant's bullet? The practice of

frisking is well accepted in police practice and police officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary fishing expedition. See, Note, Philadelphia Police Practice and The Law of Arrest, 100 *U. Pa. L. Rev.* 1182 (1952); Leagre, The Fourth Amendment and The Law of Arrest, 54 *J. Crim. L., C. & P. S.* 393 (1963). The Uniform Arrest Act and the state statutes which provide for questioning of suspicious persons specifically allow for the frisking of a suspect. See, Warner, The Uniform Arrest Act, 28 *Va. L. Rev.* 315 (1942); Gen. Laws of R. I., Sec. 12-7-2 (1956); N. H. Rev. Stat. Ann., Ch. 594, Sec. 3 (1955); 11 Del. Code Ann., Sec. 1903 (1953); N. Y. Code Crim. Pro., Sec. 180a (1965 Supp.). In other states the right is recognized by court decision. See, *People vs. Rivera,* 14 N. Y. (2d) 441 (1964); *People vs. Martin,* 46 Cal. (2d) 106 (1956); *People vs. Simon,* 45 Cal. (2d) 645 (1955); *People vs. Jones,* 176 Cal. App. (2d) 265 (1959).

In the instant case this officer, of thirty-nine years experience, reasonably suspected that the defendant was "casing" a store with robbery in mind. It was also logical for this experienced detective to presume that the defendant was armed and dangerous. As stated in the record:

> "Q. Detective McFadden, can you tell us why you turned John Terry around facing the other two men, with you behind him?
>
> "A. Due to my observation, the observation on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun."

However, we must be careful to distinguish that the frisk authorized herein includes only a frisk for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the

absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the fourth amendment and probable cause is essential. *White vs. United States,* 271 F. (2d) 829 (D. C. Cir. 1959). Therefore, we hold only that on the facts presented in the instant case, the frisk for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts.

As a result of the valid frisk, a fully loaded automatic was discovered concealed on the person of the defendant. The unauthorized possession of this weapon is a felony under Section 2923.01, Revised Code. According to the uncontradicted evidence in this case, the defendant was not arrested until after he was ordered into the store. At the moment of the arrest, the detective had reasonable grounds to believe a felony was being committed. As stated in *Beck vs. Ohio,* 379 U. S. 89 (1964):

> "Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest is made, the officers had probable cause to make it—whether at that moment, the facts and circumstances within their knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing the petitioners had committed or were committing an offense."

Therefore, we hold that, as the detective had validly found the gun, he had at the moment of the arrest adequate probable cause to arrest the defendant, *Busby vs. United States, supra,* and that the arrest in no way violated the fourth amendment.

One further point remains to be discussed concerning defendant appellant's contention that the arrest occurred at the time of the initial questioning and therefore under the exclusionary rule of *Mapp vs. Ohio,* 367 U. S. 643

(1961), the evidence must be suppressed. Although we had held that the arrest in this case did not take place until the defendant was ordered into the store, we must note in passing that even if the arrest took place as appellant contends, it does not necessarily follow that this evidence must be suppressed.

The *Mapp* exclusionary rule was imposed upon the states not because of some command inherent in the fourth amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the fourth amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in mind this raison d'etre of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. A judicial rule rendering evidence produced as the result of a frisk inadmissible would fail to deter the police from frisking suspects believed to be armed as police frisk for their own protection rather than for the purpose of looking for evidence. A rule of inadmissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty. The exclusionary rule of illegally obtained evidence cannot be interpreted solely to provide a tidy "fox hunting" theory of criminal justice. The purpose of the exclusionary rule is to control police misconduct and in this context it must be applied. Traynor, Mapp vs. Ohio At Large In the Fifty States, 1962 *Duke L. J.* 319 (1962); Note, 50 *Cornell L. Q.* 529 (1965).

Furthermore, even if the Supreme Court would hold that federal officers may not inquire into suspicious street activities or frisk in the absence of probable cause to arrest, this does not necessarily invalidate the applicable

state rules. There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts. Traynor, Mapp vs. Ohio At Large In The Fifty States, *supra*, at 320. Local problems of law enforcement are quite different from federal problems, and the range of crimes encompassed by the states' jurisdiction creates more complicated patterns to be dealt with. The states are not precluded from developing "workable rules" governing arrest, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement provided these rules do not violate the constitutional proscriptions against unreasonable searches and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. *Ker vs. California*, 374 U. S. 23 (1963); *Beck vs. Ohio*, 379 U. S. 89 (1964). The necessities of law enforcement in large urban areas require the procedures utilized in the instant case. We agree with the District of Columbia Court of Appeals when they stated that they cannot believe that the "Supreme Court has forbidden the police to investigate crime." *Trilling vs. United States*, 260 F. (2d) 677, 700 (D. C. Cir. 1958).

For the reasons stated herein, the judgment of the Common Pleas Court is affirmed.

Exceptions. Order see journal

ARTL, J. and CORRIGAN, J. concur.

[Appendix C taken from Appendix C of Appellant's brief, p. 43.]

APPENDIX D.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 18, 1967/

s/ POTTER STEWART,

Associate Justice of the Supreme Court of the United States.

Dated this 12th day of January, 1967.

APPENDIX E.

STATUTE.

§ 2923.01 Carrying of Concealed Weapons.

No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person. This section does not affect the right of sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, and special officers as provided by sections 311.07, 737.10, 1717.06, 1721.14, and 2917.32 of the Revised Code, to go armed when on duty. Deputy sheriffs and specially appointed police officers, except as are appointed or called into service under said sections may go armed if they first give bond to this state, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them. Persons injured by such improper use may have recourse on said bond.

Whoever violates this section shall be fined not more than five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one nor more than three years.